Supreme Court, U.S.
FILED
JUN 3 1998
CLERK

No. 97-1641

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL MESSINO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases:	Page
Arizona v. *Fulminante*, 499 U.S. 279 (1991)	4
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	5, 6, 7
Batson v. *Kentucky*, 476 U.S. 79 (1986)	2
Brecht v. *Abrahamson*, 507 U.S. 619 (1993)	4
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986)	6
Chapman v. *California*, 386 U.S. 18 (1967)	6
Georgia v. *McCollum*, 505 U.S. 42 (1992)	4
Getter v. *Wal-Mart Stores*, 66 F.3d 1119 (10th Cir. 1995), cert. denied, 516 U.S. 1146 (1996)	2-3
Johnson v. *United States*, 117 S. Ct. 1544 (1997)	4
Kirk v. *Raymark Indus.*, 61 F.3d 147 (3d Cir. 1995), cert. denied, 516 U.S. 1145 (1996)	2
McDonough Power Equip., Inc. v. *Greenwood*, 464 U.S. 548 (1984)	4, 5
Rose v. *Clark*, 478 U.S. 570 (1986)	4
Ross v. *Oklahoma*, 487 U.S. 81 (1988)	4
Sullivan v. *Louisiana*, 508 U.S. 275 (1993)	4
United States v. *Annigoni*, 96 F.3d 1132 (9th Cir. 1996)	2
United States v. *Hasting*, 461 U.S. 499 (1983)	3
United States v. *Horsman*, 114 F.2d 822 (8th Cir. 1997), cert. denied, 118 S. Ct. 702 (1998)	2
United States v. *Lane*, 474 U.S. 438 (1986)	3
United States v. *McIntyre*, 997 F.2d 687 (10th Cir. 1993), cert. denied, 510 U.S. 1063 (1994)	2
United States v. *Olano*, 507 U.S. 725 (1993)	7
Constitution, statutes and rules:	
U.S. Const. Amend. VI	6
28 U.S.C. 2111	5
Fed. R. Civ. P. 61	5
Fed. R. Crim. P. 52(a)	5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1641

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL MESSINO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondents do not dispute that there is a well-developed conflict among the courts of appeals on the important and recurring question whether an error impairing the exercise of a defendant's peremptory challenges requires reversal without inquiry into whether the error was harmless. Instead, they contend, for two main reasons, that the Court should not resolve the conflict in this case. First, respondents contend that there is no conflict among the courts of appeals as to "the particular issue decided by the court below," which respondents define as "whether [a] district court's failure to provide accurate notice of jury selection procedures, necessary for the intelligent exercise of peremptory challenges," requires

reversal. Br. in Opp. 13, 16. Second, respondents argue that the ruling of the court of appeals is correct. *Id.* at 18-25. Neither argument has merit.

1. The court of appeals' holding was that reversal is automatically required if "a defendant's statutory right to peremptory challenge has been denied or impaired." Pet. App. 7a. Contrary to respondents' suggestion, that holding did not depend on the particular type of impairment at issue. While the court classified the error in question as the impairment of "the intelligent exercise of the peremptory challenges to which [respondents] were entitled under Rule 24 [of the Federal Rules of Criminal Procedure]," *id.* at 6a, it explained its harmless-error holding by "join[ing]" other circuits that had rejected harmless-error analysis for the denial or impairment of a peremptory challenge in a variety of contexts. *Id.* at 7a (citing, *e.g.*, *United States* v. *Annigoni*, 96 F.3d 1132, 1147 (9th Cir. 1996) (en banc) (erroneous denial of defense peremptory challenge under *Batson* v. *Kentucky*, 476 U.S. 79 (1986)); *Kirk* v. *Raymark Indus.*, 61 F.3d 147, 162 (3d Cir. 1995) (erroneous denial of for-cause challenge in civil case), cert. denied, 516 U.S. 1145 (1996)).

There is a square conflict among the courts of appeals over the correctness of the court of appeals' automatic-reversal rule. Several circuits have taken the diametrically opposed position that an impairment of a defendant's right to exercise peremptory challenges requires reversal only if an actually biased juror is seated. See, *e.g.*, *United States* v. *Horsman*, 114 F.3d 822, 825 (8th Cir. 1997), cert. denied, 118 S. Ct. 702 (1998); *United States* v. *McIntyre*, 997 F.2d 687, 698 n.7 (10th Cir. 1993), cert. denied, 510 U.S. 1063 (1994); cf. *Getter* v. *Wal-Mart Stores*, 66 F.3d 1119,

1122 (10th Cir. 1995) (civil case), cert. denied, 516 U.S. 1146 (1996). Although the circuits taking the latter view have not yet considered the precise error that occurred in this case, respondents' convictions would certainly not have been reversed under the rule applied in those circuits, because respondents have never contended that an actually biased juror was seated. This case therefore is an appropriate vehicle for resolution of a conflict among the circuits on the harmless-error question at stake.[1]

2. Respondents also argue (Br. in Opp. 18-25) that the ruling of the court of appeals is correct. Even if that were true, the petition should nevertheless be granted, so that the Court could definitively decide the issue and resolve the current conflict among the circuits. In any event, respondents' arguments are without merit.

a. Respondents contend that errors impairing a defendant's exercise of peremptory challenges are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error'

---

[1] Respondents suggest (Br. in Opp. 17) that the petition should be denied because "analysis of the question presented could require this Court to embark upon a fact-resolution journey" that could lead it to find that the district court did not commit error at all. As we explained in our petition (at 13 n.6), however, this Court has in previous cases granted certiorari to consider only the question whether a given ruling was harmful, and has resolved those cases without consideration of the question whether the ruling was erroneous. See, *e.g.*, *United States* v. *Lane*, 474 U.S. 438, 444 n.5 (1986); *United States* v. *Hasting*, 461 U.S. 499, 506 n.4 (1983). Respondents have provided no reason why that approach should not be followed in the present case.

standards." Br. in Opp. 18 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 629 (1993)).

This Court, however, has identified "structural error" only in a "very limited class" (*Johnson* v. *United States*, 117 S. Ct. 1544, 1549 (1997)) of "*constitutional deprivations*" that deny defendants " 'basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (emphasis added; quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). In *Fulminante*, the Court identified five structural errors: total deprivation of the right to counsel, the presence of a biased decisionmaker, exclusion of members of the defendant's race from the grand jury, denial of the right to self-representation, and denial of the right to a public trial. *Id.* at 309-310. In *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), the Court recognized a sixth: the giving of a constitutionally deficient reasonable-doubt instruction.

Errors relating to the exercise of peremptory challenges meet neither criterion of structural error. It is well settled that such errors are "not of constitutional dimension," *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988), because peremptory challenges are not essential to the empaneling of an impartial jury. *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992). And, so long as no actually biased juror is seated, such errors would rarely if ever render a criminal trial fundamentally unfair or unreliable. Cf. *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553-556 (1984) (unless the juror is actually biased, the failure of a juror in a civil case to reveal information that would have led a party to exercise a peremptory chal-

lenge is not a ground for a new trial; courts should "ignore errors that do not affect the essential fairness of the trial").[2] Accordingly, the issue here should be resolved by conventional analysis under Rule 52(a) of the Federal Rules of Criminal Procedure.

b. Respondents argue (Br. in Opp. 18-23) that errors impairing a defendant's exercise of peremptory challenges are presumptively prejudicial, and thus necessarily "affect substantial rights" within the meaning of Rule 52(a). In support of their argument, respondents rely (Br. in Opp. 19) principally on this Court's statement in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 257 (1988), that reversal is appropriate under Rule 52(a) in cases in which an error "render[ed] the proceedings fundamentally unfair, allowing the presumption of prejudice."

The doctrine that prejudice can be presumed from certain errors that render proceedings "fundamentally unfair" is of no assistance to respondents. The court of appeals concluded that the error in the present case caused two potential jurors who otherwise would have been excused to participate as regular jurors. Respondents were willing to accept all of

---

[2] Respondents claim that *McDonough* is irrelevant, because it was "a civil case which did not implicate Rule 52 of the Federal Rules of Criminal Procedure." Br. in Opp. 23 n.9. But the Court in *McDonough* expressly relied on 28 U.S.C. 2111 (requiring courts to disregard "errors or defects which do not affect the substantial rights of the parties"), which applies in both civil and criminal proceedings. See 464 U.S. at 554 & n.4. The Court also relied upon Federal Rule of Civil Procedure 61, which contains language that is substantially identical to the language of Rule 52(a) of the Federal Rules of Criminal Procedure. See *id.* at 553-554.

the jurors who deliberated, at least as alternates, and there is no basis for a presumption that the jury selected in the present case "would treat [respondents] unfairly." *Bank of Nova Scotia*, 487 U.S. at 257. To the contrary, although respondents assert that the error had various effects on the composition of the jury (Br. in Opp. 23), they do not dispute that the jury that decided their case was impartial.

c. Finally, respondents rely on the following syllogism: the right to peremptory challenges is an important, and therefore a "substantial," right; errors impairing that right necessarily "affect" it; such errors therefore necessarily "affect substantial rights" within the meaning of Rule 52(a), thus requiring reversal. Br. in Opp. 22-23.

The flaw in respondents' syllogism, however, is illustrated by consideration of a criminal defendant's Sixth Amendment right to cross-examine adverse witnesses. That right is certainly important, and thus, in one permissible sense of the word, "substantial." See *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-679 (1986). And any erroneous ruling curtailing that right could be said to "affect" the right. Thus, according to respondents' syllogism, any error impairing a defendant's right to cross-examine would affect substantial rights within the meaning of Rule 52(a), and would therefore require reversal. To the contrary, however, an error curtailing a defendant's Sixth Amendment right of cross-examination justifies reversal only if the government fails to establish beyond a reasonable doubt that the error did not "contribute to the verdict obtained." *Id.* at 680 (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)).

In order to merit reversal under Rule 52(a), an error must either "render the proceedings fundamen-

tally unfair, allowing the presumption of prejudice," *Bank of Nova Scotia*, 487 U.S. at 257, or be "prejudicial," *i.e.*, "affect[] the outcome of the district court proceedings," *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The error in the present case did neither, and the court of appeals therefore erred in reversing respondents' convictions.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JUNE 1998